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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SHANNON GARCIA, Plaintiff and Appellant, v. CITY OF SAN DIEGO et al., Defendant and Respondents.	D053429 (Super. Ct. No. 878762)
SHANNON GARCIA et al., Plaintiffs and Appellants, v. CITY OF SAN DIEGO et al., Defendants, Cross-defendants and Respondents; RAYMOND GARCIA III et al., Cross-complainants and Appellants.	(Super. Ct. No. 37-2007-00065306-CA-PA-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, John S. Meyer, Judge. Affirmed.

I.

INTRODUCTION

On December 2, 2005, at approximately 10:00 p.m., Raymond Garcia, Jr. (Raymond) was walking across Texas Street, approximately 160 feet north of the intersection of Texas Street and El Cajon Boulevard in San Diego. As he crossed the street, Raymond was struck by a police car driven by defendant, San Diego Police Officer Oscar A. Armenta. Raymond died as a result of the injuries he sustained in the accident.

In October 2007, the trial court consolidated two actions brought by Raymond's wife, Shannon Garcia (Shannon) and Raymond's children and step-children (collectively plaintiffs), against Officer Armenta, the City of San Diego, and the City of San Diego Police Department (collectively defendants). In their complaints, plaintiffs alleged, among other causes of action, that Officer Armenta had negligently caused his vehicle to collide with Raymond, resulting in Raymond's death. In March 2008, after a trial, a jury rendered a special verdict finding that Officer Armenta had not been negligent. The trial court subsequently entered judgment in favor of defendants.

On appeal, plaintiffs claim that the trial court erred in denying their request that the court instruct the jury to consider whether Officer Armenta was negligent per se for having failed to stop at a red light at the intersection of Texas Street and El Cajon Boulevard. We affirm the judgment.

II.

FACTUAL AND PROCEDURAL BACKGROUND[1]

A. *The accident*

On December 2, 2005, at approximately 10:00 p.m., Officer Armenta drove his police car out of a parking lot located at the intersection of Texas Street and El Cajon Boulevard. Officer Armenta drove into a northbound lane on Texas Street and stopped at a red light at the limit line of the intersection of Texas and El Cajon Boulevard. After the light turned green, Officer Armenta waited a "tad," and then proceeded northbound on Texas through the intersection with El Cajon Boulevard. Officer Armenta estimated that he was driving at a speed of 20 to 25 miles per hour.

At approximately the same time, Shannon and Raymond were walking south on Texas Street toward the intersection with El Cajon Boulevard. They stopped near an alley that intersected with Texas Street. Raymond told Shannon that he would cross Texas to go to a store to purchase cigarettes for her. Approximately 160 feet north of the end of the intersection of Texas and El Cajon Boulevard, Raymond attempted to cross the street. As Raymond stepped out from around a car in the southbound lane of Texas Street into the northbound lane, Officer Armenta struck Raymond with his police car.

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1 We state the factual background in the light most favorable to the judgment. (*Whiteley v. Philip Morris Inc.* (2004) 117 Cal.App.4th 635, 642.) In reviewing plaintiffs' claim of instructional error (see pt. III., *post*), we review the evidence in the light most favorable to the plaintiffs. (*Alcala v. Vazmar Corp.* (2008) 167 Cal.App.4th 747, 754 (*Alcala*).)

Officer Armenta did not see Raymond prior to the impact. As a result of the collision, Raymond suffered serious injuries, from which he eventually died.

B. *Pretrial procedural history*

In January 2007, Shannon filed a complaint, both individually and as Raymond's successor in interest, against the defendants (Case No. GIC 878762). In her complaint, Shannon alleged that Officer Armenta struck Raymond with his police car, causing Raymond's death, and that she had "contemporaneously observed" the events that led in Raymond's death. Shannon also alleged that the collision occurred in an unmarked alley/intersection that constituted a dangerous condition of the roadway. Shannon brought five causes of action, entitled "dangerous condition," "negligence," "emotional distress," "loss of consortium," and "survival action for punitive damages."

In April 2007, Shannon, together with Raymond's son, Ruben Garcia (Ruben), and Raymond's step-children, Vanessa Hunter (Vanessa) and Michael Kerr (Michael), filed a separate wrongful death action against defendants arising from the accident (Case No. 37-2007-00065306-CA-PA-CTL). In this complaint, Shannon, Ruben, Vanessa, and Michael brought causes of action entitled "dangerous condition," "negligence," and "punitive damages." Shannon, Ruben, Vanessa, and Michael also named Raymond Garcia III (Raymond III) and Kathleen Garcia (Kathleen) as "[c]onditional [p]arty

[d]efendants."[2] Raymond III and Kathleen subsequently filed a cross-complaint in Case No. 37-2007-00065306-CA-PA-CTL for wrongful death against the defendants. In their cross-complaint, Raymond III and Kathleen explained that they joined in all of Shannon, Ruben, Vanessa, and Michael's wrongful death claims.

In October 2007, pursuant to the parties' stipulation, the trial court ordered the two cases consolidated.

C. *The verdict, judgment, and appeal*

On March 20, 2008, after a trial, the jury returned a verdict in favor of defendants on all of plaintiffs' claims. On a special verdict form, the jury found that Officer Armenta had not been negligent, that the property on which the accident occurred was not in a dangerous condition at the time of the incident, and that Officer Armenta had not negligently injured and killed Raymond.

In May 2008, the trial court entered judgment in favor of defendants in accordance with the jury's verdict.

Plaintiffs timely appeal from the judgment.

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2 Shannon, Ruben, Vanessa, and Michael stated that they did so because Raymond III and Kathleen are heirs of Raymond who are entitled to bring an action on behalf of Raymond, and that Shannon had not been able to obtain their consent prior to filing the action.

III.

DISCUSSION

The trial court did not err in denying plaintiffs' request to instruct the jury regarding negligence per se

Plaintiffs claim that the trial court erred in denying their request to instruct the jury to consider whether Officer Armenta was negligent per se for having failed to stop at a red light at the intersection of Texas Street and El Cajon Boulevard, in violation of Vehicle Code section 21453, subdivision (a).[3]

A. *Standard of review*

"Challenges to jury instructions are subject to a de novo standard of review." (*Sander/Moses Productions, Inc. v. NBC Studios, Inc.* (2006) 142 Cal.App.4th 1086, 1094.) In reviewing a claim that the trial court improperly refused a requested jury instruction, we view the evidence in the light most favorable to the party that requested the instruction. (See fn. 1, *ante*; *Alcala, supra,* 167 Cal.App.4th at p. 754.) "We assume that the jury might have believed the evidence upon which the instruction favorable to the [party that requested the instruction] was predicated." (*Ibid*.)

However, de novo review does not relieve the appellant from the obligation to demonstrate legal error on appeal. "It is a fundamental rule of appellate review that the judgment appealed from is presumed correct and ' " 'all intendments and presumptions are indulged in favor of its correctness.' " [Citation.]' [Citation.] An appellant must

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3 Unless otherwise specified, all subsequent statutory references are to the Vehicle Code.

provide an argument and legal authority to support his contentions. This burden requires more than a mere assertion that the judgment is wrong. 'Issues do not have a life of their own: If they are not raised or supported by argument or citation to authority, [they are] . . . waived.' [Citation.] It is not our place to construct theories or arguments to undermine the judgment and defeat the presumption of correctness." (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852 (*Benach*).)

B. *Factual and procedural background*

During the trial, outside the presence of the jury, the trial court indicated to plaintiffs' counsel that the court was skeptical as to whether Officer Armenta's alleged act of driving through a red light at the intersection of Texas Street and El Cajon Boulevard was a proximate cause of the accident. Plaintiffs' counsel responded, "Officer Armenta would not [have been] at the point of impact if he didn't run that red light." The court replied:

> "I understand. But he would not have had the accident if he hadn't gotten up that morning or if he had taken the day off . . . . I mean it's a clear causation issue, almost as a matter of law."

The court observed that there was no evidence that Officer Armenta's alleged failure to stop for a red light, in combination with other factors, had caused the accident:

> "There is no evidence whatsoever, at least so far, that [Officer Armenta] was in any way inattentive, he was speeding, that he was distracted, that he was in a hurry. Even assuming that he ran the red light, whatever that means ─ I mean he didn't blast though the red light. We know he was stopped before. Maybe he jumped the light, maybe . . . the light turned green for southbound traffic and turned red for northbound traffic and he went through the red light right as it changed or something. [¶] What does that have to do with causing this particular incident?"

During a jury instruction conference outside the presence of the jury, defense counsel indicated that the plaintiffs were requesting that the trial court instruct the jury regarding negligence per se. The following colloquy then occurred:

> "[Defense counsel]: ─ Presumption of negligence per se . . . . Based on what evidence I have no idea. But they're offering it. This is not a negligence per se case.
>
> "The court: I agree. I mean clearly it's ─
>
> "[Defense counsel]: It's the last one [CACI No.] 418, presumption of negligence per se. Are you looking at that your honor?
>
> "[Plaintiffs' counsel]: Your honor, if they believe they ran a red light and if you believe that ─ well, actually it would apply to both Mr. Garcia and ─
>
> "The court: No, I'm not going to give the negligence per se instruction.
>
> "[Plaintiffs' counsel]: Um, even if ─ I mean is the jury going to be allowed to ─ if they find probable cause, caused [*sic*] by the running of the violation of the traffic signal, wouldn't that be appropriate?
>
> "The court: I'm not going to give the instruction. I don't think it's appropriate in this case.
>
> "[Plaintiffs' counsel]: All right.
>
> "The court: The jurors ─ it's a straight negligence case, and it's a causation case frankly. "

Plaintiffs' requested negligence per se instruction provides as follows:

> "California Vehicle Code [section] 21453 [, subdivision] (a) states: A driver facing a steady circular red signal alone shall stop at a marked limit line, but if none, before entering the crosswalk on the near side of the intersection or, if none, then before entering the intersection, and shall remain stopped until an indication to proceed is shown . . . ."

"If you decide[:]

"1. That Defendants City of San Diego and Officer Oscar A. Armenta violated this law and

"2. That the violation was a substantial factor in bringing about the harm, then you must find that Defendants were negligent.

"If you find that Defendants did not violate this law or that the violation was not a substantial factor in bringing about the harm, then you must still decide whether Defendants were negligent in light of the other instructions."[4]

C. *Governing law*

1. *General principles of law regarding jury instructions*

" '[A] party is entitled to have the jury instructed as to his theory of the case provided (1) that he requests and submits legally correct instructions, and (2) that there is sufficient evidence to support the theory.' [Citation.]" (*Thompson Pacific Const., Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 547 (*Thompson Pacific Const., Inc.*).)

2. *Negligence per se*

Evidence Code section 669 codifies the common law doctrine of negligence per se. That section provides:

"(a) The failure of a person to exercise due care is presumed if:

"(1) He violated a statute, ordinance, or regulation of a public entity;

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[4] The record contains a declaration from the attorney for Shannon, Ruben, Vanessa, and Michael, stating that the trial court file did not contain the requested instruction. The attorney attached a copy of the requested instruction to his declaration. The defendants have raised no objection to either the declaration or the copy of the requested instruction. We therefore assume, for purposes of this decision, that plaintiffs in fact offered the instruction in the copy that is attached to the attorney's declaration in the record.

> "(2) The violation proximately caused death or injury to person or property;
>
> "(3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and
>
> "(4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted."

"All four elements must be shown in order for a claim of negligence per se to succeed." (*Newhall Land & Farming Co. v. Superior Court* (1993) 19 Cal.App.4th 334, 347.) Whether a person violated a statute and whether the violation proximately caused injury are normally questions for the trier of fact. (*Daum v. SpineCare Medical Group, Inc.* (1997) 52 Cal.App.4th 1285, 1306 (*Daum*).) Whether the injury resulted from an occurrence that the statute was designed to prevent and whether the injured person was among the class of protected persons are questions of law. (*Ibid*.)

CACI No. 418 is a standard jury instruction regarding the negligence per se doctrine, which provides as follows:

> "[Insert citation to statute, regulation, or ordinance] states: _____.
>
> "If you decide
>
> "1 That [name of plaintiff/defendant] violated this law and
>
> "2 That the violation was a substantial factor in bringing about the harm, then you must find that [name of plaintiff/defendant] was negligent [unless you also find that the violation was excused].
>
> "If you find that [name of plaintiff/defendant] did not violate this law or that the violation was not a substantial factor in bringing about the harm [or if you find the violation was excused], then you

must still decide whether [name of plaintiff/defendant] was negligent in light of the other instructions."[5]

3. *Section 21453, subdivision (a)*

Section 21453, subdivision (a) provides in relevant part:

> "A driver facing a steady circular red signal alone shall stop at a marked limit line, but if none, before entering the crosswalk on the near side of the intersection or, if none, then before entering the intersection, and shall remain stopped until an indication to proceed is shown . . . ."

D. *Application*

In their opening brief, plaintiffs contend that they presented sufficient evidence at trial from which the jury could have found that Officer Armenta violated section 21453, subdivision (a) by driving northbound on Texas Street through a red light at the intersection of Texas and El Cajon Boulevard.[6] Even assuming for sake of argument that this is true, plaintiffs' claim of instructional error fails because plaintiffs have not demonstrated that the record contains sufficient evidence from which a jury could have

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[5] CACI No. 418 addresses only the first two elements of the negligence per se doctrine; the remaining two elements present questions of law for the trial court. (See *Daum, supra,* 52 Cal.App.4th at p. 1306 [discussing BAJI No. 3.45, the standard jury instruction on negligence per se in the BAJI series of jury instructions].)

[6] The plaintiffs contend that the jury could have made such a finding based on various items of evidence that were presented at trial, including testimony regarding the traffic light signal sequencing patterns for northbound and southbound traffic on Texas Street at the intersection with El Cajon Boulevard, eyewitness testimony that the traffic light for southbound traffic was green just prior to the collision, and expert testimony regarding the time that it would have taken Officer Armenta to travel through the intersection to the location where the accident occurred.

concluded that Officer Armenta's violation of section 21453, subdivision (a) was a proximate cause of the accident. (See Evid. Code, § 669, subd. (a)(2).)

Specifically, although plaintiffs acknowledge in their opening brief that "the [trial] court . . . ruled as a matter of law that even if a violation of [section 21435, subdivision (a)] had occurred, it was not a substantial factor in bringing about the injury or harm in this case," plaintiffs present no argument in that brief as to why the trial court erred in reaching this conclusion. Their sole contention in this regard in their opening brief is the following assertion: "[T]he jury could have reasonably concluded that the violation was a substantial factor in bringing about the harm (i.e. but for running the red light, plaintiff would not have been run over by defendant's vehicle)." This assertion is not a substitute for legal argument premised on evidence presented at trial. (See *Alioto Fish Co. v. Alioto* (1994) 27 Cal.App.4th 1669, 1689.)

Further, given that the accident occurred approximately 160 feet beyond the intersection of Texas Street and El Cajon Boulevard, and that Officer Armenta was driving 20 to 25 miles per hour at the time of the impact, it is far from self-evident that a jury could have reasonably found that Officer Armenta's violation of section 21453, subdivision (a) was a proximate cause of the accident. Plaintiffs cite no evidence in the record regarding the time or distance that it would have taken Officer Armenta to stop his vehicle at the speed at which he was traveling.[7] Our own review of the record indicates

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[7] In addition, plaintiffs do not point to any evidence in the record that indicates that Officer Armenta's alleged failure to stop for the red light caused him to increase his speed just prior to the collision, or, to be inattentive to the surrounding conditions.

that the defendants presented expert testimony from accident reconstructionist David Casteel that a person moving at 25 miles per hour travels approximately 36.67 feet per second, and that it would take such a person 4.57 seconds to travel 167.9 feet. Casteel also testified that a driver's "perception response time"[8] is approximately "one to one and a half seconds." In view of this testimony, we see no basis upon which a jury could reasonably have concluded that Officer Armenta's alleged violation of section 21453, subdivision (a) ─ which would have been completed approximately 160 feet prior to the location of the collision ─ was a proximate cause of the accident. Even assuming that Officer Armenta failed to stop at the red light, in light of Casteel's testimony, that failure would not have placed Officer Armenta in a location such that he would not have had sufficient time to stop his vehicle prior to striking Raymond.

By failing to point to any evidence in the record that would support a jury finding in their favor on the issue of proximate cause, plaintiffs have failed to demonstrate that the trial court erred in refusing to give their requested instruction. (See *Newhall Land & Farming Co. v. Superior Court*, *supra*, 19 Cal.App.4th at p. 347 [all four elements of Evidence Code section 669 must be must be established for party to prevail on negligence per se theory]; *Thompson Pacific Const., Inc.*, *supra*, 155 Cal.App.4th at p. 547 [trial

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8 Although Casteel did not specifically define the term "perception response time," he testified generally that "perception reaction time," refers to the time required for a driver to perceive and react to potentially hazardous events while driving.

court need only instruct on theory of case supported by sufficient evidence].)[9] Accordingly, we conclude that the plaintiffs have not demonstrated that the trial court erred in denying their request to instruct the jury regarding negligence per se.[10]

IV.

DISPOSITION

The judgment is affirmed. Plaintiffs are to bear costs on appeal.

AARON, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McDONALD, J.

9 Plaintiffs present no legal argument in their opening brief in support of their contentions that Raymond's death resulted from an occurrence that the statute was designed to prevent, or that Raymond was a member of the class of persons for whom the statute was adopted, beyond asserting that "it would appear from the evidence that those elements were established."

10 In light of our conclusion, we need not consider the plaintiffs' contention that the purported instructional error was prejudicial.